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Supreme Court, U.S.
FILED

No. 931938 MAY 17 1994

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

TRACY CECIL HAMMOND, JR.,

Petitioner

vs.

PAMELA WITHROW, Warden,
Michigan Reformatory

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner Tracy C. Hammond, Jr. was convicted in state court of first degree premeditated murder. His state court appeals lost, and he filed a Petition for Habeas Corpus in U.S. District Court under 28 U.S.C. §2254. Petitioner seeks certiorari from the decision of the Sixth Circuit Court of Appeals affirming the District Court's denial of his Petition for Habeas Corpus.

QUESTION 1: In a state court trial for murder where the defense claims that the actual murderer was a different person, is testimony relevant that would tend to make a case against that other person?

QUESTION 2: Where 2 people are charged with murder and tried separately, and one defendant claims the other defendant was alone guilty of the killing, may the court, consistent with due process, preclude the defense from showing the guilt of the other party on the ground that the motive of a person not presently on trial is irrelevant?

QUESTION 3: Where the prosecutor is repeatedly permitted to argue to the jury that the killing was about drugs, can the judge, consistent with due process, exclude evidence that the killing was really about something else?

QUESTION 4: Can a state court judicial ruling excluding evidence constitute the deprivation of a federal due process right, and render a trial fundamentally unfair?

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Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Tracy Cecil Hammond, Jr., Petitioner, by and through his attorney, James S. Lawrence, moves this Court to issue a Writ of Certiorari to review a judgment of the United States Court of Appeals for the Sixth Circuit, issued February 17, 1994, in Case No. 93-1538.

OPINIONS BELOW

The opinion of the Sixth Circuit Court of Appeals of February 17, 1994, is attached as Appendix A, beginning at page A1. The Judgment of the United States District Court for the Western District of Michigan of March 8, 1993, by the Hon. Benjamin F. Gibson, is attached as Appendix B, beginning at page A13. The Report and Recommendation of United States Magistrate Hugh W. Brenneman of February 16, 1993 is attached as Appendix C, beginning at page A14.

The following state court documents are included in the Appendix. The Order of the Michigan Supreme Court of May 31, 1991 is attached as Appendix D, beginning at page A25. The Opinion of the Michigan Court of Appeals of July 6, 1990 is attached as Appendix E, beginning at page A26.

STATEMENT OF JURISDICTION

This case was filed in U.S. District Court as a Petition for Writ of Habeas Corpus for a state prisoner being held in violation of the constitution of the United States, with jurisdiction attaching under 28 U.S.C. §2254. Habeas corpus relief was denied by the United States District Court, Western District of Michigan, on March 8, 1993.

The final judgment of the U.S. Court of Appeals for the Sixth Circuit affirming the District Court was entered February 17, 1994. This Court has jurisdiction to entertain a Petition for Writ of Certiorari pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioner Tracy C. Hammond, Jr. was charged in state court of first degree premeditated murder, M.C.L. 750.316. A jury trial was held in the Livingston County, Michigan, Circuit Court before the Hon. Stanley J. Latreille on March 22, 23 and 24, 1988. Petitioner was convicted as charged. On April 29, 1988, Judge Latreille sentenced Petitioner to prison for life without possibility of parole. An appeal of right was taken to the Michigan Court of Appeals, which affirmed by opinion dated July 6, 1990. The Michigan Supreme Court denied leave to appeal by order dated May 31, 1991.

A habeas corpus petition under 28 U.S.C. §2254, along with Brief in Support and Appendix, was filed in U.S. District Court, Western District of Michigan, on March 16, 1992. A Magistrate's Report and Recommendation, recommending that habeas corpus relief be denied, was issued February 17, 1993 by Magistrate Hugh Brenneman. Objections to the Magistrate's Report were filed, and Judge Benjamin Gibson issued a Judgment upholding the Magistrate's Report on April 8, 1993. Notice of Appeal was filed April 8, 1993. On May 7, 1993, Judge Gibson issued a Certificate of Probable Cause to Appeal. On February 17, 1994, the Sixth Circuit Court of Appeals issued an opinion affirming the District Court.

The deceased, Ron Johnson, was found beaten to death in a field in Livingston County. (T 234, 447). The major evidence against Petitioner Tracy Hammond was his statement to police. The statement was labeled in court opinions as a

confession, but it was not a confession to murder, as Tracy specifically denied killing the deceased.

Tracy told police that his cousin, Mark Hammond, proposed that Ron Johnson, a drug dealer, be told that there was an opportunity to sell drugs at a party in Bath, Michigan that Mark and Tracy would take him to. Ron would then be taken to a secluded place and robbed of his drugs. Tracy always carried a metal pipe with him. While at the secluded location, Ron reached down as if for a weapon, and came after Petitioner, and Petitioner hit him once with the pipe. Then, Mark Hammond hit Ron once with a board, then took the pipe from Petitioner, and beat Ron several times until Ron died. There was no intention or plan on Tracy's part to kill Ron Johnson. Tracy did not believe that Mark was going to kill Ron Johnson, but Mark killed him anyway. Later, Petitioner and Mark hid the pipe and board. (T 281-328).

Dr. Mohammad Rabbani testified that the cause of death was multiple blunt force injuries to the head. (T 251). He testified there could have been a non-fatal blow first, followed by killing blows by another person. (T 263). He testified at the preliminary examination that the killing blows were more likely committed by a right-handed person (Petitioner is left-handed), but at the time of trial was no longer sure of that. (T 261-268).

Brenda Hodgson, Petitioner's girlfriend, testified that Petitioner told her what happened. That version is the same as he told police; that Ron Johnson came after Tracy, that Tracy hit him once to defend himself, and that Mark Hammond then unexpectedly beat Ron Johnson to death. (T 424, 435).

Diane Richardson testified that Mark and Tracy left together in her car around midnight on Friday and did not return

until 3 or 3:30 in the morning. (T 352-356, 359). Tracy habitually carried a metal pipe named "Fred." (T 355-358). On the Sunday after the killings, Petitioner asked to get in her car to get the pipe out. (T 359). He also told her, if anyone asked, that she should say he was there all night Friday night. (T 360).

Karen Neganigijig testified that Mark Hammond and Petitioner saw her at the restaurant where she worked, before the killing, and that Petitioner expressed a desire to kill someone. This was between 4:30 and 5:30 p.m. (T 402). The defense disputed that testimony. Defendant was at work at that time, and then was dropped off at home after work by Francisco Mata, and that was not until 6:30 p.m. (T 486-487). It was argued that another person was with Mark Hammond at the restaurant, and not Petitioner. Petitioner did not dispute that he was present at the killing itself.

The defense tried to introduce the testimony of John Budd, also known as Gene Budd, and made an offer of proof. Mr. Budd, a middle-aged homosexual, had a relationship with Mark Hammond, and placed him in his will. Subsequently, Mark Hammond lost favor with Mr. Budd, and Mr. Budd wrote Mark Hammond out of the will, and replaced him with Ron Johnson, the deceased in this case. (T 470-478). The trial judge ruled that the jury could not be informed about the Budd will and the reasons why Mark wanted to kill Ron Johnson, because it was irrelevant and collateral. (T 481, 484). After trial, the judge allowed a separate record to be made of Mr. Budd's testimony. (T Apr 11, 1988).

The Budd testimony was admitted by the prosecutor at Mark Hammond's trial to prove his guilt of the murder.

After trial, defense counsel made a motion for new trial based on newly discovered evidence. The evidence was 2 statements. One statement was from Clara Hammond, grandmother of both Mark Hammond and Petitioner Tracy Hammond. The other was a statement of Dennis Bowyer who shared a cell with Mark Hammond at the jail. The newly discovered evidence of both Clara Hammond and Dennis Bowyer consisted of statements by Mark Hammond. The trial court denied the motion.

The affidavit of Clara Hammond shows that John (Gene) Budd, a middle-aged homosexual, had a relationship with Mark Hammond, and placed him in his will. Subsequently, Mark Hammond lost favor with Mr. Budd, and Mr. Budd wrote Mark Hammond out of the will, and replaced him with Ron Johnson, the deceased in this case. Clara Hammond says that Mark Hammond swore that Ron Johnson "will pay for this."

The affidavit of Dennis Bowyer said that while in the jail, Mark Hammond admitted that Tracy did not kill the deceased, but that Mark killed him. Mark Hammond said that he killed Ron Johnson with the pipe belonging to Tracy Hammond. Mark told Mr. Bowyer that Mark wanted to kill Ron Johnson, and that Tracy was against any killing. Mark also said that Tracy hit Ron Johnson only once, when Johnson attacked Tracy.

REASONS FOR GRANTING THE WRIT

QUESTION 1: In a state court trial for murder where the defense claims that the actual murderer was a different person, is testimony relevant that would tend to make a case against that other person?

QUESTION 2: Where 2 people are charged with murder and tried separately, and one defendant claims the other defendant was alone guilty of the killing, may the court, consistent with due process, preclude the defense from showing the guilt of the other party on the ground that the motive of a person not presently on trial is irrelevant?

QUESTION 3: Where the prosecutor is repeatedly permitted to argue to the jury that the killing was about drugs, can the judge, consistent with due process, exclude evidence that the killing was really about something else?

QUESTION 4: Can a state court judicial ruling excluding evidence constitute the deprivation of a federal due process right, and render a trial fundamentally unfair?

One of the most fundamentally unfair things a judge can do at a criminal trial is prevent the introduction of testimony relevant to the defense. It is particularly unfair when the prosecutor is allowed to paint a picture of the facts which is directly at odds with the excluded evidence. Such a procedure allows the jury to hear only the government's version of the facts, and permits that version to go unchallenged. It is not surprising that a jury kept in the dark about critical evidence opposing the prosecutor's view of the case would often adopt the prosecutor's view. The result: an unreliable verdict and a denial of due process of law. U.S. Const., Amend. XIV.

A defendant in a criminal trial has the right "to seek out the truth in the process of defending himself." Davis v. Alaska, 415 U.S. 308, 320; 94 S.Ct. 1105; 39 L.Ed.2d 347 (1974). "Few rights are more fundamental than that of an accused to present witnesses in his own defense." Chambers v. Mississippi, 410 U.S. 284, 302; 93 S.Ct. 1038; 35 L.Ed.2d 297 (1973). Indeed, as recently as 1987, in Rock v. Arkansas, 483 U.S. 44; 107 S.Ct. 2704; 97 L.Ed.2d 37, 48-49 (1987), the Court held that it is unconstitutional to exclude testimony material to the defense.

Without the right to introduce relevant evidence, the other due process rights which a society affords are denuded of value. If the jury cannot hear the truth they cannot reach a reliable verdict. A jury needs to hear what was actually going on to reliably decide "the factual question of the defendant's guilt or innocence," which is the central purpose of a criminal trial, Delaware v. Van Arsdell, 475 U.S. 673; 106 S.Ct. 1431; 89 L.Ed.2d 674 (1986), and that purpose is frustrated when the jury is deceived by the hiding of evidence relevant to that determination.

The question of when testimony is "relevant" is a recurring theme in all jurisprudence. Further, under Rock, Chambers and Davis, excluding relevant testimony in a criminal trial is an issue of constitutional dimension. Regrettably, the Sixth Circuit was unable to find a constitutional issue in this case, because of the cramped standard for relevance they employed. The standard adopted in this case is a blatantly pro-prosecution standard: if evidence points at the accused, let it in; if evidence points at someone else, it is irrelevant and therefore stays out.

The real and legitimate need to punish crime does not justify using unfair trial procedures that load the dice against the accused. If the prosecutor can argue that a killing was over drugs, a fair judicial process would permit the defense to try to show that the real reason for the killing was quite different. It is unfair and unjust to let the prosecutor demonstrate to the jury his theory of why the killing took place, while denying the defense the right to present an opposing theory.

This case cleanly presents the recurring and complex concept of relevance in an interesting factual setting. Also, the existence of a record of the excluded evidence, made outside the presence of the jury , means that this Court would not have to guess at the nature of the excluded testimony; it is all right in the record. This case is therefore ideal for Supreme Court review.

At Petitioner Tracy Hammond's 1988 state court trial for first degree premeditated murder, the prosecutor introduced Petitioner's statement to police that he and his cousin Mark Hammond intended to rob Ron Johnson of drugs, but that Mark Hammond unexpectedly killed Ron Johnson. If believed, this would be a **complete defense** to the charge of murder. Under Michigan law, if an accused participated in the robbery, but did not intend or expect that his fellow robber would commit a killing, the accused would not be guilty of murder. People v. Aaron, 409 Mich. 672 (1980).

During the trial, the prosecutor consistently argued to the jury that the killing was done by Tracy Hammond and Mark Hammond jointly, and that this was a killing about drugs. (T 221, 226, 507, 510-511, 532, 538-539). The defense wished to show that the killing was done by Mark Hammond, and that it was not about drugs. The defense wished to show that the

killing was an unexpected act of Mark Hammond, who had an independent motive to kill.

Counsel for Petitioner Tracy Hammond tried to introduce the testimony of John Budd, also known as Gene Budd. Mr. Budd, a middle-aged homosexual, had a relationship with Mark Hammond, and placed him in his will. Subsequently, Mark Hammond lost favor with Mr. Budd, and Mr. Budd wrote Mark Hammond out of the will, and replaced him with Ron Johnson, the deceased in this case, resulting in threats by Mark Hammond to get even with Ron Johnson. This supported the defense theory that Mark Hammond, and not Tracy Hammond, had a plan to kill Ron Johnson. The evidence would have shown the real motive for the crime, and real reasons for believing Tracy Hammond that it was Mark Hammond and not he that intended to kill and did kill. The evidence would have supported the defense theory that the drug theft was a smokescreen used by the clever Mark Hammond to dupe Tracy Hammond into being present at a killing planned by Mark, but unexpected by Petitioner, so that Petitioner would get the blame which properly belonged to Mark. (T 470-478).

The judge ruled that the matter was not relevant. Petitioner submits that, in a trial for murder, the reason why the killing took place is of great relevance. As the Court held in People v. Mihalko, 306 Mich. 356, 360-361 (1943): "In a prosecution for murder, proof of motive, while not essential, is always relevant."

Except in this case, the motive for a crime has always been held to be relevant and admissible. People v. Mihalko, supra; People v. Federico, 146 Mich. App. 776 (1985); People v. Noble, 152 Mich. App. 319 (1986). The fact that Mark but

not Tracy had a reason for killing the deceased, and the fact that the killing was not about drugs as the prosecution repeatedly argued to the jury, makes the testimony about the real motive a "fact that is of consequence to the determination of the action," and therefore the testimony was relevant and should have been admitted. United States v. Dunn, 805 F.2d 1275 (6th Cir. 1986).

The prosecution was repeatedly allowed to state that this was a killing about drugs. The defense had evidence that the prosecution's theory simply was not true. The killing was about the desire of Mark Hammond for revenge. Once the jury knew this, they could more reasonably see how Mark Hammond's plan involved duping Petitioner into being present so Mark could kill Ron Johnson and pin the blame on Petitioner. When the jury heard this, they would realize that the case did not go down as the prosecution theorized, and that Petitioner could not have done any premeditating, but that Mark did.

If a person is killed and the jury hears about one possible motive for the killing but no other motives, it is logical that they would find that the killing was about the motive they heard about. For example, if a married man is killed and his wife is prosecuted, and the jury hears that the husband had mistreated the wife, the jury might well take that motive as cause to disbelieve the wife's protestations of innocence. If, however, the jury was made aware of evidence that the deceased had recently cheated others in business deals, or owed large sums of money to drug dealers, or had recently testified against organized crime conspirators, they might not give such great weight to the fact that the wife may also have had a motive. If

the defense had such evidence and wanted to introduce it, they would have a due process right to do so.

This, of course, is the central point on which the Sixth Circuit and lower courts disagreed with Petitioner. According to them, showing that Mark Hammond had a motive to kill did not disprove that Petitioner had a motive to kill, and it therefore was inadmissible. (Appendix, A5-A6). Under this theory, in the wife-accused-of-murder case, showing that the cheated business associates had a motive to kill did not disprove that the wife had a motive to kill, and would therefore be inadmissible.

In Herrera v. Collins, ___ U.S. ___; 113 S.Ct. 853; 52 Cr.L. 2090, 2098 (1993), the Court held that there was a significant difference between someone coming up with this kind of evidence years after the fact, and someone trying to admit it at the trial itself. Justices O'Connor and Kennedy noted, 52 Cr.L. at 2099, that "Our society has a high degree of confidence in its criminal trials, in no small part because the Constitution offers unparalleled protections against convicting the innocent." Petitioner has not received these unparalleled protections. A country in which you do not get the right to present your side of the case at trial is not the unparalleled utopia of justice of which Justices O'Connor and Kennedy speak.

In this case, if the jurors had known the truth, they might have found that the killing was not about drugs, and believed the Petitioner's story that Mark Hammond had a secret agenda of death which was unknown to Petitioner.

There was no legitimate reason to keep this evidence from the jury. This evidence would have no tendency to prejudice the prosecution. The only "prejudice" from allowing in the testimony would have been prejudice to the prosecutor's

desire to present his own theory without contradiction by the defense.

Incomprehensibly, the Michigan Court of Appeals ruled that the motive of Mark Hammond to kill Ron Johnson was not relevant, because Mark Hammond had a separate jury. (Appendix A30). The ruling was incomprehensible because Michigan cases uniformly hold proof of motive to be relevant, without regard to how many are charged and without regard to whether there was more than one trial. The ruling of the Sixth Circuit is more comprehensible; that Court simply adopted the state court's analysis. However, state court conclusions of law are not binding on the federal courts, and should not be followed blindly. Sumner v. Mata, 455 U.S. 591; 102 S.Ct. 1303; 71 L.Ed.2d 480 (1982); Cuyler v. Sullivan, 446 U.S. 335; 100 S.Ct. 1708; 64 L.Ed.2d 333 (1980).

Was the excluded testimony, in any sense of the word, "relevant"? Petitioner submits that it was. After all, the excluded testimony did not deal with the price of soybeans in Iowa; it dealt with the motives for the very killing for which Petitioner Tracy Hammond was on trial. The testimony in question was not about the motives of some bicycle repairman in Chelyabinsk; it was about the motives of Mark Hammond, who was right there on the scene in Livingston County at the time of the killing. The inheritance dispute was not about an inheritance going to some elderly lady in Florida who had nothing to do with the case; it was the inheritance dispute of the actual person who was killed. This testimony was so relevant that it was a central feature of the state's trial against Mark Hammond. Can it really be said that the excluded testimony had nothing to do with how it is Ron Johnson came to be killed?

Can it really be said that the actions and motivations of the killer have nothing whatever to do with the guilt or innocence of the killer's alleged accomplice?

The primary defect in the analysis of relevance by the lower courts is that it ignored the fact that there are two sides to a criminal lawsuit. According to the Court of Appeals, if the evidence tends to support the prosecutor's theory of the case, it is relevant, but if it tends to support the defense theory, that has nothing to do with proving the defendant guilty, so the jury never needs to hear it.

A second defect in the Court of Appeals' analysis is the ruling that exclusion of defense evidence in state court does not present a federal constitutional question. (Appendix, A6). If that is so, then Davis, Chambers, and Rock were all wrongly decided by this Court. This Court should grant certiorari, if for no other reason than to correct the Sixth Circuit on this critically important ruling of law.

In Petitioner's view, the whole picture of how the killing came to take place is relevant. If evidence is relevant at Mark Hammond's trial, it is necessarily relevant at Tracy Hammond's trial for the very same killing. We submit that evidence is relevant when it supports the defense theory of the case, even if it does nothing to support the prosecutor's case. The Sixth Circuit's ruling was fundamentally flawed because it recognizes the prosecutor's theory of the case as the only standard by which to measure relevance, and ignores the fundamental need of the defense to show what really happened.

Can you imagine how outraged you would feel, if you were on trial for murder, and the court ruled that you could not

present to the jury the motives and actions of someone whom you claim to have been the actual killer?

Petitioner Tracy Hammond's statement was that Mark Hammond was the actual killer. The very evidence excluded in this case was successfully used by the prosecutor in Mark Hammond's trial to prove Mark was the killer.

Petitioner Tracy Hammond stated that Mark concealed his intention to kill from Petitioner. Is not the nature of Mark's motivation relevant to whether he would reveal it to Petitioner?

If the jurors knew that Mark, and not Tracy, had the motive to kill, they might be more likely to believe Tracy's statement that Mark, and not Tracy, did the actual killing. They might be more likely to believe that the one with the motive premeditated, but that Tracy did not. To deprive the Petitioner of this critical opportunity to defend himself was manifestly unjust and a miscarriage of justice. In a trial for murder in the death of Ron Johnson, to keep the jury in the dark as to who had the motive to kill is a measure **calculated** to bring about unjust results. There is **no** justification, good or otherwise, for hiding from the jury the truthful facts which the Petitioner needed to defend himself, while allowing the prosecutor to paint a false picture for the jury. See Scott v. Foltz, 612 F. Supp. 50 (E.D. Mich. 1985).

The defense was that the killing took place in the manner Petitioner said, that is, by Mark Hammond alone, without advance notice to Petitioner. The excluded evidence was critical **not** because the will issue is itself a defense or excuse for killing; the excluded evidence was critical because it provided a **reason** for believing Petitioner's version of who did the killing and under what circumstances.

It must also be remembered that this was prosecuted as a **premeditated** killing. A jury might well find premeditation by the Petitioner when they are kept unaware of the true motives and motivations of the actual killer. However, if they had realized the true nature of Mark Hammond's plans and motivations, they might have believed that Mark Hammond had a plan to kill which he concealed from Tracy Hammond, and therefore conclude that Tracy did not premeditate.

The unfairness is highlighted by an incident that took place before witnesses were called. The defense moved to exclude references to drugs in this case, and the Court denied it. (T 198-206). In arguing in favor of admissibility, the prosecutor stated (T 204):

> "I don't think that we can sanitize the facts of the trial and the testimony of all of the witnesses who are going to testify to those things. That is what they did, and I think the jury should be made aware of it, that that is the underlying factor of the reason that led to Mr. Cameron's death. It had something to do with the narcotics."

The judge then allowed in references to drugs because "this is part of the whole picture here." (T 205). Petitioner submits that allowing evidence of drugs (the motive for the killing, under the prosecutor's theory) but excluding evidence about a struggle to inherit the Budd estate (the motive for the killing, under the defense theory) was not calculated to show "the whole picture," but was, indeed, calculated to show a sanitized picture, the very thing the prosecutor found to be

horribly unfair when it was directed at the evidence he wanted in.

To paint a false picture for the jury, while hiding the true facts, is plainly unconstitutional. Scott v. Foltz, supra. **The prosecutor made numerous arguments he would not have dared to make if the true facts had been known to the jury.** The courts below clearly erred by failing to find any constitutional issue in the deliberate deception of the jury and the hiding of facts which could have made the jurors see the case in a different light.

The presentation of sanitized facts to the jury, with the jury carefully kept ignorant of the reason why this killing took place, and who had that reason, rendered this trial grossly unfair and its results unreliable. Excluding evidence of what was the real motive for the crime, and who had the real motive for the crime, is a violation of due process under Chambers v. Mississippi, and Rock v. Arkansas, and detrimentally impacts on "the central purpose of a criminal trial" as defined in Delaware v. Van Arsdell. In light of that, this Court should grant Certiorari and find a denial of due process.

Conclusion

This Court should grant Certiorari, find that Petitioner was denied a fair trial by exclusion of evidence about who committed the killing and why, and order that Petitioner be granted habeas corpus relief unless the state courts agree to retry him within a reasonable period of time.

Respectfully submitted

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May 2, 1994

NOT FOR PUBLICATION
No. 93-1538

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

TRACY CECIL HAMMOND, JR.,	FILED FEB 17 1994
Petitioner-Appellant,	LEONARD GREEN, Clerk
vs.	
PAMELA WITHROW, Warden, Michigan Reformatory,	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN
Respondent-Appellee.	DISTRICT OF MICHIGAN

BEFORE: MILBURN and BOGGS, Circuit Judges; and CONTIE, Senior Circuit Judge.

PER CURIAM. Tracy Cecil Hammond, Jr., petitioner-appellant, appeals the district court's dismissal of his habeas corpus petition by respondent-appellee, Pamela Withrow, warden, Michigan Reformatory.

I.

On March 22 through 24, 1988, petitioner was tried on a charge of first degree premeditated murder in the death of Cameron (Ron) Johnson. A jury trial was held in the Livingston County, Michigan Circuit Court. Petitioner was charged along with his cousin Mark Hammond in the death of Johnson. The defendants were granted separate trials as a result of a motion by petitioner for severance. During trial a motion for directed verdict was denied. Petitioner was convicted as charged. On April 29, 1988, he was sentenced to life imprisonment. After exhausting his state court

remedies, petitioner filed a habeas corpus petition under 28 U.S.C. § 2254 in the United States District Court for the Western District of Michigan on March 16, 1992. On February 17, 1993, a magistrate issued a report and recommendation, recommending that the petition be denied. The district court issued a judgment upholding the magistrate's report on April 8, 1993.

The murder at issue in the present case was committed on October 31, 1987. The deceased, Ron Johnson, was found beaten to death in a field. In a statement he made to the police, petitioner told the police that his cousin Mark Hammond proposed that they tell Ron Johnson, a drug dealer, that there was an opportunity to sell drugs at a party in Bath, Michigan, but they actually take him to a secluded place and rob him of his drugs.

On the night of October 30, 1987, petitioner and Mark Hammond were at a party where petitioner was seen with a lead pipe, which it was known he always carried. Earlier in the evening, petitioner and Mark Hammond had visited with an acquaintance, Ms. Neganigijig, who testified at trial that petitioner had stated that he might have to kill someone. After petitioner made this comment concerning the possibility of killing someone, Mark Hammond mentioned that they had business to do.

On the night of the party, petitioner and Mark Hammond left the party around midnight and picked up Ron Johnson and drove to a remote area near a church. After the three men left the car, petitioner alleged that Johnson knelt down as though he were going to reach for a weapon and charged at petitioner. Petitioner admitted that he hit Johnson at least once in the head with the pipe and possibly twice. He alleged that Mark Hammond then hit the victim with a piece of wood that broke over his head. Petitioner claimed that he, after hitting the victim, turned toward the car and at this point,

Mark Hammond grabbed the lead pipe from him and proceeded to beat the victim to death. The autopsy of the victim indicated he died from multiple blunt force injuries to the head with skull fractures and contusions and lacerations of the brain. Petitioner and Mark Hammond returned to the party between 3 and 3:30 a.m. on October 31, 1987. The party was at a house owned by Mark Hammond's girlfriend, Diane Richardson. Ms. Richardson testified at trial that petitioner told her that she was to say that petitioner had been at the house the entire night. Brenda Hodgson, petitioner's girlfriend, went with petitioner the next day on November 1, 1987 to the crime scene in order to retrieve the murder weapons and a jacket which had been left there.

Petitioner was arrested on November 4, 1987. Miranda warnings were given, petitioner made a taped statement, which was played to the jury at trial. In the statement, he stated that he was not threatened or promised anything by anyone. He then described the incident as an attempted drug robbery that had gone wrong. He conceded that in discussing the robbery, Mark Hammond had warned him about the possibility that Johnson would have to be killed to prevent him from hiring someone to come after them. Petitioner stated, however, that he had objected to killing Johnson. Petitioner then explained how he and Mark Hammond had taken Johnson to the remote, secluded area and attempted to rob him. He stated that the victim had attacked him so he hit him once or twice on the head with a lead pipe. He then described how Mark Hammond had taken the pipe from him and continued to beat Johnson until he was dead. In his statement, petitioner described the victim as "kind of timid".

At trial, petitioner relied on two theories in defense. The first was self defense. The second was that Mark Hammond had the intention to kill Mr. Johnson and had duped petitioner into going

along so that Mark Hammond could blame the murder on him. To support this theory, petitioner attempted to introduce at trial the testimony of John Budd, who was a homosexual who had had a past relationship with Mark Hammond. During the relationship, Budd had listed Mark Hammond as the beneficiary of his will. When the relationship between Mark Hammond and Budd was over, Hammond was removed from the will and was substituted by the victim, Ron Johnson, who had become Budd's lover. According to petitioner's theory, the reason Mark Hammond killed Ron Johnson was in order to get revenge for being taken out of the Budd will. Petitioner alleged that Mark Hammond duped him into thinking a robbery was taking place so that Hammond could kill Johnson and blame it on the petitioner.

The trial court refused to allow Mr. Budd to testify, finding that the testimony of Budd was irrelevant, because petitioner's motive had already been established in the case. The testimony of Ms. Neganigijig indicated that petitioner made a clear statement on the night of the party of an intent to kill prior to the murder. Also petitioner in his taped confession acknowledged prior discussions with Mark Hammond on the possible need to kill the victim. Although petitioner stated that he had argued against the killing, he, nevertheless, went forward with the plan with the understanding that his cousin might attack the victim and severly injure or kill him. The trial Court thus concluded that evidence of petitioner's motive had already been presented in the case and an attempt to show the motive of Mark Hammond was irrelevant to petitioner's motive. The trial court stated that Mark Hammond might have had two motives -- the first, to rob and then silence the victim, and the second, to gain revenge. The court stated that even if petitioner had gone out to the secluded area with the intent to murder for a different reason than

Mark Hammond, petitioner would still be guilty of first degree murder notwithstanding the fact that he was duped about Mark Hammond's real motive. In finding that Mark Hammond's motive was a collateral issue, the court stated, "You are trying to get inside the intent of Mark Hammond, his actions and activity, which is totally outside the realm of this trial." therefore, the trial court granted the prosecutor's motion in limine to prohibit the testimony of John Budd, because it was irrelevant whether Mark Hammond had an ulterior motive or reason for the murder that differed from, or was unknown by, petitioner.

The district court in the present case found that the state trial court did not violate petitioner's federal constitutional rights and dismissed his petition for habeas corpus. Petitioner timely filed this appeal.

II.

We must first decide whether the district court erred in concluding petitioner was not denied a fair trial by the trial court's exclusion of Budd's testimony, which would have indicated a possible additional or different motive for Mark Hammond to murder the victim. Petitioner argues that he was denied his right to present his defense at trial because he was prevented from introducing the testimony of Mr. Budd. Although it is a fundamental element of due process to give the defendant the right to present his witnesses at trial to establish a defense, Washington v. Texas, 388 U.S. 14, 19 (1967), a criminal defendant must also comply with the state's established rules of procedure and evidence. Chambers v. Mississippi, 410 U.S. 284, 302 (1973). Under the state rule of evidence, the state trial court found that Mr. Budd's testimony was not relevant, because it was being offered to establish that Mark Hammond had a motive to kill Ron Johnson that was different from the petitioner's motive. The trial court concluded that Mark

Hammond's motive was irrelevant because the relevant issue was whether petitioner had the requisite intent to kill Ron Johnson, regardless of whether Mark Hammond did or did not also have a motive.

Respondent argues that petitioner is attempting to have this court review a state court evidentiary ruling on the admissibility of evidence, which does not raise a federal constitutional question, and thus is not reviewable in a habeas corpus petition. Bell v. Arn, 536, F.2d 123, 125 (6th Cir. 1976).

We agree. the admissibility of the evidence at issue does not raise a federal constitutional question because it did not violate petitioner's due process right to present a defense. The issue before the jury was whether the petitioner had the intent to kil Ron Johnson. The relevant question was not whether Mark Hammond had a motive and whether that motive was shared by petitioner, but whether petitioner had a motive as two co-defendants can clearly have distinct motives for committing a crime. Whether Mark Hammond may have had a different motive to kill the victim does not tend to prove or disprove whether petitioner also had a motive and the requisite intent to commit the crime. Even if Mark Hammond had a different unexpressed motive to kill Ron Johnson to get revenge for being replaced by Johnson in Budd's will, this motive would not disprove that petitioner also had the intent to kill and premeditated the murder. To conclude, we find that evidentiary rulings of state courts are not cognizable in habeas corpus cases unless the trial was rendered fundamentally unfair, which did not occur in the present case. Lundy v. Campbell, 888 F.2d 467, 469-70 (6th Cir. 1989), cert. denied, 110 S.Ct. 2212 (1990). The district court is affirmed on this issue.

III.

We must next determine whether the district court erred in concluding that petitioner was not denied due process by the denial of a new trial based solely on newly discovered evidence.

Petitioner contends that a new trial should have been granted based on newly discovered evidence because of the information provided by his grandmother, Clara Hammond, and a statement made by Mark Hammond to a cellmate in jail. Petitioner states that his grandmother, who is also the grandmother of his cousin Mark Hammond, the co-defendant, was told by Mark Hammond that either Ron Johnson or Mr. Budd would pay for the fact that Mark had been taken out of Mr. Budd's will. This statement was made at the grandmother's house allegedly sometime in the summer of 1987, prior to the murder.

The trial Court concluded that this statement of petitioner's grandmother did not qualify as newly discovered evidence under Townsend v. Sain, 372 U.S. 293, 317 (1963), because the statement of petitioner's grandmother could have been discovered earlier with the exercise of due diligence. We agree. The grandmother was known to the petitioner and any statements made to her were reasonably available to petitioner before trial. Therefore, the failure to procure such testimony was the fault of petitioner and cannot be imputed to the state. Moreover, the testimony of Clara Hammond would only be used to buttress the evidence about the relationship between Mark Hammond and John Budd, which had already been ruled irrelevant.

Petitioner also claims that an exculpatory statement made by Mark Hammond, heard by his cellmate, constituted newly discovered evidence. According to the cellmate, Dennis Boywer, Mark Hammond had stated on several occasions that he had been the one

who killed Ron Johnson and that petitioner was only taken along so that Mark Hammond would have someone to accuse if the murder were discovered. Also, the cellmate stated that Mark Hammond had explained how petitioner had only hit Ron Johnson once and then walked away, while Mark Hammond continued to beat him. Mark Hammond's comments were made allegedly made sometime in January, 1988, and the cellmate revealed them to petitioner in April, 1988.

The trial court ruled that Mark Hammond's statements to the cellmate did not qualify as newly discovered evidence because they were cumulative. Under Townsend v. Sain, 372 U.S. at 317, the newly discovered evidence must be material and not merely cumulative or impeaching. We agree that the statements merely reiterate what the jury heard through petitioner's police statement. Even if Mark Hammond took petitioner along with him to have someone to blame the murder on, if petitioner, who struck the victim, alos had the intent to kill, the fact that he was duped does not negate his motive.

Finally, under the new Supreme Court standard for admitting newly discovered evidence, petitioner's claim must fail. In Herrara v. Collins, 113 S. Ct. 853, 860 (1993), claims of actual innocence based on newly discovered evidence are not a ground for fedearl habeas relied absent an independent constitutional violation. In the present case, the testimony of the cellmate of a confession by Mark Hammond addresses only the guilt or innocence of petitioner and therefore cannot support a habeas petition. Moreover, in light of the substantial evidence against petitioner, it is unlikely that the testimony of the cellmate, which was deemed cumulative to the petitioner's own confession and admissions, would have changed the outcome of the trial. Petitioner admitted transporting the victim to

a remote location and hitting him in the head with a metal pipe. There was testimony he made a statement prior to the murder about being ready to kill someone; he admitted subsaequent to the murder that he and Mark Hammond may have killed the victim.

To conclude, we believe that the allegedly newly discovered evidence addresses only the guilt or innocence of petitioner rather than an independent constitutional violation and thus is not grounds for federal habeas relief.

IV.

Finally we must decide whether the trial court erred in concluding that there was sufficient evidence to support the conviction of petitioner for murder in the first degree.

The standard for review in evaluating an insufficiency of the evidence claim in a petition for habeas corpus relief, is whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319 (1979). The appellate court must review the evidence and the inferences to be drawn therefrom in the light most favorable to the prosecution. Neal v. Morris, 972 F.2d 675, 678 (7th Cir. 1992). The state does not have to rule out every hypothesis of guilt beyond a reasonable doubt, and the reviewing court need not be convinced of petitioner's guilt beyond a reasonable doubt. Id. at 677-78.

Under Michigan law, MCL §750.316, first degree murder is defined as a wilful, deliberate, and premeditating killing. According to People v. Garcia, 398 Mich. 250 (1976), the elements to be proven are premeditation, deliberation and the intent to kill. Premeditation and deliberation require that there be a thought process undisturbed by hot blood, and although the minimum time necesary to exercise

this process is incapable of exact determination, the interval between initial thought an ultimate action should be long enough to afford a reasonable person time to subject the nature of the response to a second look. People v. Glover, 154 Mich. App. 22, 28-29 (1986).

Respondent argues that petitioner's statement to the police indicateds that he intended to rob Ron Johnson of his drugs, and that he had a conversation in which Mark Hammond explained to him that in carrying out their plan to rob Mr. Johnson, it might also be necessary to kill him. To rebut petitioner's claim that he only wanted to hurt Mr. Johnson and did not intent to murder him, the prosecutor presented the testimony of Ms. Neganigijig, who stated that petitioner had seen her earlier on the night of the murder and stated that he was ready to kill someone. Moreover, at the party on the night of the murder petitioner was seen openly displaying the lead pipe that was later used to kill Johnson. In his confession, petitioner stated that he took the pipe with him on the night of the murder because he believed the situation might turn violent.

Although petitioner may have been more apprehensive about killing Ron Johnson than Mark Hammond was, we believe there was ample evidence from which to find that petitioner was nevertheless prepared to kill and did so. Apparently, the jury believed Ms. Neganigijig's testimony rather than petitioner's story. If all the evidence is taken in the light most favorable to the prosecution, the jury was entitled to conclude that the plot to rob Ron Johnson was planned beforehand and included discussion about the necessity of killing Johnson to avoid retaliation. Petitioner took the steps necessaru to carry out the robbery by tricking the victim into exiting the car and by arming himself with the weapon which was ultimately used to kill Johnson, and which petitioner was aware could inflict severe harm. Petitioner admitted that he hit the victim in the

head with his pipe at least once and possibly twice, and then the victim died as a result of multiple blows to the head. Petitioner subsequently told other that he had hit the victim and that the cousins may have killed Johnson. They then disposed of the murder weapons in order to avoid detection. The jury, as the trier in fact, was entitled to make reasonable inferences from the petitioner's discussion of the plan with Mark Hammond and from Ms. Neganigijig's statement that petitioner had made a clear statement of intent to kill prior to the murder and could conclude such a statement proved premeditation and deliberation as well as intent. The jury was entitled to disbelieve petitioner's protestations that he did not intend to kill the victim based on the statement of Ms. Neganigijig, his actions in removing Ron Johnson to the remote area where he was slain with a weapon provided by defendant, and his statement that he administered a blow to the victim's head with a lead pipe.

For these reasons, we find there was sufficient evidence to convict petitioner of first degree premeditated murder.

V.

Finally we must decide whether the district court erred in concluding that petitioner's statement to the police was freely and voluntarily given without threats or promises by the police.

Prior to trial, petitioner challenged the introduction of his taped confession, claiming that it was coerced. He argued that the police told him to cooperate or they would file charges against his girlfriend. He claimed the police told hiom that they already had her in custody. The trial Court ruled that no such threats were made, based on petitioner's statement during the confession that no such inducements of any kind were made and that petitioner's girlfriend had never been taken into custody.

Petitioner was granted a Walker hearing, which is a hearing held in the Michigan state courts, outside the presence of the jury, to determine whether a confession was voluntarily made. See People v. Walker, 374 Mich. 331 (1965). The ultimate issue is the voluntariness of the confession, Colorado v. Connelly, 479 U.S. 157, 164-66 (1986), which is a legal question requiring de novo review. Cooper v .Scroggy, 845 F.2d 1385, 1390 (6th Cir. 1988).

The trial judge who conducted the Walker hearing made a finding of fact that the police did not tell petitioner that his girlfriend would be charged unless petitioner cooperated. This court must give a high level of deference to findings of fact by the state trial court. Williams v. Withrow, 944 F.2d 284, 288 (6th Cir. 1991). Because the findings of fact of the state court, which this ocurt must adopt, indicated there were no inducements offered for the confession, we must conclude there was no improper inducement rendering petitioner's confession involuntary. Furthermore, petitioner's own statement that no inducement had been made and the self-serving nature of his retraction of that statment support this conclusion. The district court is hereby affirmed on this issue.

VI.

The judgment of the district court is AFFIRMED.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

TRACY CECIL HAMMOND, JR.,

Petitioner,

V.

PAMELA WITHROW,

Respondent.

HON. BENJAMIN F. GIBSON

FILE NO. 1:92 CV 203

JUDGMENT

At a session of the Court held in and for said District and Division in the City of Grand Rapids, Michigan, this 8th day of March, 1993.

PRESENT: HON. BENJAMIN F. GIBSON, DISTRICT JUDGE

This Court has reviewed the Report and Recommendation filed by the United States Magistrate in this action. The Court has also given new consideration and made a de novo determination of those portions to which specific objection has been made.

Pursuant to such review and determination, IT IS ORDERED that the Report and Recommendation of the Magistrate is approved and adopted as the opinion of the Court and this case is DISMISSED.

IT IS SO ORDERED.

BENJAMIN F. GIBSON
U.S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

TRACY CECIL HAMMOND, JR.,

Petitioner,

V.

Case No. 1:92 CV:203
Hon. Benjamin F. Gibson

PAMELA WITHROW,

Respondent.
_____/

REPORT AND RECOMMENDATION

Petitioner, a prisoner currently incarcerated at the Michigan Reformatory in Ionia, Michigan, has filed a Petition for Writ of Habeas Corpus, pursuant to U.S.C. § 2254.

Background

Petitioner was tried and convicted before a jury on March 22-23, 19988 for first degree murder. The murder was committed on October 31, 1987, and the victim was a man named Ron Johnson.

Petitioner argues that the murder was actually committed by his cousin, Mark Hammond. According to petitioner, he and Mark Hammond developed a plan in which they would pick up the victim and take him to a party, where they would rob him of drugs (Tr. 282-283).

On the night of October 31, 1987, petitioner and Mark were at a party and were seen with a lead pipe (Tr. 413). It was known that the petitioner always carried a lead pipe (Tr. 356). Earlier in the evening, petitioner and Mark visited with an acquaintance, who testified at trial that petitioner stated that he might have to kill someone (Tr. 402) After petitioner's comment concerning the

possibility of killing someone, Mark mentioned that they had business to do (Tr. 402).

Petitioner and Mark left the party around midnight (Tr. 353). They picked up Ron Johnson and drove to a remote area near a church (Tr. 282-309). The three individuals left the car (Tr. Id.) Petitioner claims that the victim knelt down as though he were reaching for a weapon and then charged at petitioner (Tr. Id.). Petitioner admitted hitting Ron Johnson at least once and possibly twice on the head (Tr. Id). mark hit the victim with a piece of wood that broke over the victim's head (Tr. Id). Petitioner claims that, after hitting the victim, he turned toward the car and Mark grabbed the lead pipe from him (Tr. Id). According to the petitioner, Mark proceeded to beat the victim to death (Tr. Id) The autopsy showed that Ron Johnson died from multiple blunt injuries to the head with skull fractures and contusions and lacerations of the brain (Tr. 251).

Petitioner returned to the party he had been at earlier between 3:00 and 3:30 A.M. on October 31, 1987 (Tr. 353). The party was at ahouse owned by Mark Hammond's girlfriend, Diane Richardson. Ms. Richardson testified that petitioner told her that she was to tell anyone that petitioner had been at the house all night (Tr. 360). Brenda Hodgson, petitioner's own girlfriend, went with petitioner on November 1, 1987 to the crime scene in order to retrieve the murder weapons and a jacket that had been left there (Tr. 422).

The police traced the crime to petitioner and arrested him on November 4, 1987. After being warned of his rights, petitioner made a taped statement. The statement was played to the jury (Tr. 281-329). In the statement, petitioner states that he was given his Miranda warnings and that he was not threatened or promised anything by anyone. Petitioner described the incident as an

attempted drug robbery that had gone wrong. He stated that Mark haad warned him about the possibility that Ron Johnson would have to be killed and that he objected to killing him. Petitioner explained how he and Mark had taken Johnson to a remote area and then attempted to rob him. He explained that the victim attacked him and that he hit him once or twice on the head. He then described how Mark had taken the pipe from him and continued to beat Johnson until he was dead. Petitioner described the victim as "kinda timid."

Petitioner had two theories that he relied upon in defense. The first was self defense. The second theory was that Mark had intended to kill Mr. Johnson and had duped peetitioner into going along so that Mark could blame the murder on petitioner. To support petitioner's theory, he attempted to introduce the testimony of a Mr. John Budd.

Mr. Budd is a homosexual who had a past relationship with Mark. During the relationship, Mark had been listed in Budd's will. When the relationship ended, Mark was removed from the will, and was replaced by the victim, Ron Johnson. According to petitioner, Mark sought revenge for being taken out of the will and intended to kill Mr. Johnson and blame it on the petitioner.

The trial court refused to allow Mr. Budd to testify because the testimony would have been irrelevant. According to the court, the only relevant issue was petitioner's state of mind. It was irrelevant if Mark had an ulterior motive or reasoning that differed from, or was unknown by, the petitioner.

Prior to the trial, petitioner challenged the introduction of the taped confession, claiming that it was coerced. Petitioner argued that the police told him to cooperate or they would file charges against his girlfriend. He claimed that the police told him that they already had her in custody. The court ruled that no such threats were

made, based on petitioner's statement during the confession that no inducements of any kind were made by anyone. Also, the officer who took the confession testified that no such inducements/threats were made and petitioner's girlfriend was not in custody.

The jury was instructed as to first degree murder and aiding and abetting. Petitioner was found guilty of first degree murder and sentenced to life in prison without parole. Petitioner requested a new trial based on insufficiency of evidence, error in the trial court's decision to exclude evidence, and newly discovered evidence. The request for a new trial was denied. Petitioner also appealed his conviction and raised five issues on appeal: (1) insufficient evidence at the preliminary hearing, (2) request for a new trial based solely on newly discovered evidence, (3) exclusion of Mr. Budd's testimony, (4) suppression of petitioner's confession, and (5) permitting references to narcotics throughout the trial. Petitioner's appeal was denied on July 6, 1990. Petitioner filed a delayed application for leave to appeal to the Michigan Supreme Court, which was dismissed on May 31, 1991 without opinion. Consequently, petitioner has exhausted his state remedies.

Discussion

The first issue raised by petitioner is that the court created a constitutional error when the judge refused to allow petitioner to introduce the testimony of Mr. Budd. Petitioner argues that because the testimony was not permitted, the trial was conducted in a manner that violated his due process rights.

The court would not allow Mr. Budd to testify because his testimony only went to the state of mind or motive of Mark Hammond. The court ruled that the evidence was inadmissible because the only relevant issue during the petitioner's trial was petitioner's intent. According to the court:

> It doesn't matter if Mark Hammond had an additional motive. That would not excuse this witness -- or excuse me, this Defendant, if he had a motive that was not the same as Mark Hammond's, if he had been dubbed into believing that the reason for getting rid of this person was because he might retaliate or he was some sort of a bothersome witness perhaps in the future. Even if he were totally dubbed -- and that wasn't Mark Hammond's real reason -- and that doesn't matter. He can still be convicted of the motive that he may have had (Tr. 482-483).

Petitioner argues that the evidence was relevant because it would have shown that Mark Hammond had the intention and a motive to kill Ron Johnson. Petitioner states that motive in a murder case is always relevant and would have been admissible under Michigan's Rules of Evidence 403.

Despite petitioner's argument that the absence of Mr. Budd's testimony rendered the trial fundamentally unfair and a violation of due process, what petitioner is attempting to do is have this court make an evidentiary ruling. The purpose of this habeas corpus is not to determine the validity of a state court's evidentiary holding. State court rulings on the admissibility of evidence may not be questioned in a federal habeas corpus proceeding unless they raise a federal constitutional question. Bell v. Arn, 536 F.2d 123, 125 (6th Cir. 1976)

Due process requires that a defendant be permitted to present witnesses who will establish a defense. Washington v. Texas, 388 U.S. 14, 19 (1967). However, Mr. Budd's testimony was being offered to plant a seed in the minds of the jurors that Mark Hammond had a motive to kill Ron Johnson that was different from the petitioner. But the motive of Mark Hammond was irrelevant. The relevant issue was whether petitioner had the requisite intent to kill

Ron Johnson, regardless of whether Mark Hammond did or did not also have a motive.

Petitioner's next issue is that a new trial should have been granted based solely on newly discovered evidence. The newly discovered evidence that petitioner is referring to is information that his grandmother had and a statement made by Mark Hammond to a cellmate in jail.

Petitioner states that his grandmother, also the grandmother of MArk Hammond, was told by Mark Hammond that either Ron Johnson or Mr. Budd would pay for the fact that Mark had been taken out of Mr. Budd's will. This statement was made at the grandmother's house sometime in the summer of 1987, prior to the murder.

The "new" evidence that petitioner has discovered from Mark Hammond's cellmate involves a conversation that Mark had with, or overheard by, the cellmate. According to the cellmate, Mark stated on several occasions that he had been the one who killed Ron Johnson and that petitioner was only taken along so that Mark would have someone to accuse if the murder was discovered. Also, the cellmate stated that Mark had explained how petitioner only hit Ron Johnson once and then walked away while Mark continued beating him. Mark's comments were made sometime in January, 1988 and the cellmate revealed them in April, 1988.

The mere existence of newly discovered evidence pertaining to the guilt of a state prisoner is not a ground for relief in federal habeas corpus. Townsend v. Sain, 372 U.S. 293, 317 (1963). The "new" evidence does not fit within the definition of newly discovered evidence that will give a petitioner a new trial. To obtain a new trial based on newly discovered evidence, the evidence (1) must have been discovered after trial, (2) must not have been discoverable earlier in the exercise of due diligence, (3) must be

material and not merely cumulative or impeaching, and (4) must be likely to produce an acquittal if the case were retried. United States v. Scaife, 749 F.2d 338, 349 (6th Cir. 1984).

The statement to petitioner's grandmother could have been discovered earlier with the exercise of due diligence. The grandmother was obviously known to petitioner and statements made to her, if there were any, were certainly discoverable prior to trial. As for Mark's subsequent statements to the cellmate, they do not qualify as newly discovered evidence because they are cumulative. The statements merely reiterate what petitioner told police and what the jury was told when petitioner's police statement was heard by the jury. Finally, for the reasons previously discussed, it is highly unlikely such information would have led to an acquittal of petitioner since it was his motivation and his actions that were in question, not those of someone else who may have also been guilty. Accordingly, petitioner's request for relief based on this issue should be denied.

The third issue raised is that sufficient evidence was not produced upon which to convict petitioner. In evaluating an insufficient evidence claim in a petition for habeas corpus, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). The reviewing court must view the evidence and the inferences to be drawn therefrom in the light most favorable to the prosecution. Near v. Moriss, 972 F.2d 675, 678 (6th Cir. 1992). the state need not rule out every hypothesis of guilt beyond a reasonable doubt, and the reviewing court nedd not be convinced of petitioner's guilt beyond a reasonable doubt. Id. at 677-678.

In Michigan, first degree murder is defined as a wilful, deliberate, and premeditated killing. M.C.L. 750.316. The elements that must be proven are premeditation, deliberation, and the intent to kill. People v. Garcia, 398 Mich. 250 (1976). Premeditation and deliberation require that there be a thought process undisturbed by hot blood and, although the minimum time necessary to exercise this process is incapable of exact determination, the interval between initial thought and ultimate action should be long enough to afford a reasonable person time to subject the nature of response to a second look. People v. Glover, 154 Mich. App. 22, 28, 29 (1986).

Petitioner argues that he never intended to kill Mr. Johnson and, therefore, the elements of intent, deliberation, or premeditation were not established. Petitioner's statement to the police indicates that he intended to rob Ron Johnson of his drugs. His statement also includes a conversation in which Mark Hammond explained that in carrying out their plan to rob Mr. Johnson, the latter might have to be killed, although petitioner states that he only wanted to hurt Mr. Johnson (Tr. 283-284). To rebut petitioner's claim that he did not intend to murder Mr. Johnson, the prosecutor presented the testimony of Ms. Neganigijig, who stated that petitioner had seen her prior to the murder and stated that he was ready to kill someone (Tr. 402). Apparently, the jury believed Ms. Neganigijig's testimony rather than petitioner's story. Furthermore, at the party petitioner attended prior to picking up the victim, he was seen openly displaying the lead pipe that was later used to kill Mr. Johnson (Tr. 413) In his own statement, petitioner states that he took the pipe with him on the night of the murder because he believed the situation might turn violent (Tr. 293).

While petitioner may have been more apprehensive about killing Ron Johnson than Mark Hammond, there was ample evidence

from which to find that petitioner was nevertheless prepared to kill and did so. I cannot reach the conclusion that a rational trier of fact could not have found that there was no premeditation, intent or deliberation.

The final issue raised by petitioner is that the court should have suppressed the statement he made to the police. Petitioner asserts that the confession was rendered involuntary based on the officer's alleged threat not to release petitioner's girlfriend if petitioner did not cooperate.

Petitioner was granted a Walker hearing [1] on this issue and the court decided that his confession was voluntary. The court noted that the police testified that the petitioner's girlfriend was not in custody when the interrogation of petitioner took place nor were any threats/promises of leniency made. Furthermore, petitioner began his confession by stating that no threats or inducements had coerced into making the statement. Based on the totality of the circumstances, the judge ruled that the police did not tell petitioner that his girlfriend would be charged unless petitioner cooperated.

The ultimate issue is the voluntariness of the confession, Colorado v. Connelly, 479 U.S. 157, 164-6 (1986), which is a legal question requiring independent federal determination. Miller v. Fenton, 474 U.S. 104, 110 (1985), Cooper v. Scroggy, 845 F.2d 1385, 1390 (6th Cir. 1988).

The judge who conducted the Walker hearing made a findingof fact that the police did not tell petitioner that his girlfriend

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[1] A hearing held in the Michigan states courts, outside the presence of the jury, to determine whether a confession was voluntarily made, and is thus admissible in court. People v. Walker, 374 Mich 331 (1965).

would be charged unless petitioner cooperated. This court must give complete deference to the state court's findings of fact. Williams v. Withrow, 944 F.2d 284, 288 (6th Cir. 1991). Because the finding of fact that this court must adopt indicates that no inducement was offered, there was no improper inducement rendering petitioner's confession involuntary. Furthermore, petitioner's own statement that no inducement had been made and the partially self-serving nature of the statement, support this conclusion.

Notwithstanding my conclusion that no statement concerning petitioner's girlfriend was made, and that the statement was voluntary, such a statement would not render the confession involuntary even if it had been made. While the Supreme Court has expressly reserved judgment on the constitutional implications of a prosecutor's offer, during plea bargaining, of adverse or lenient treatment for some person other than the accused, United States v. Usher, 703 F.2d 956, 958 (6th Cir. 1983); citing Bordenkircher v. Hayes, 434 U.S. 357, 364 n. 8, 98 S.Ct. 663, 668 n. 8, 54 L.Ed.2d 604 (1978), the Sixth Circuit has decided the issue in favor of upholding the constitutionality of such tactics. Usher at 958; Hudson v. Lack, 770 F.2d 166 (6th Cir. 1985) (unpublished opinion).

In Hudson, the petitioner challenged the validity of his plea because it was made under the pretense that the police would be lenient on his girlfriend. When the petitioner entered his plea, he signed a waiver and stated in court that his plea was entered freeely and voluntarily. The court ruled that the plea was voluntarily given because "the promise of leniency to a person other than defendant does not, in and of itself, constitute coercion." the court did not entertain the notion that petitioner's waiver was false because, "while a court has the obligation to ascertain the existence of any bargains, it is not obligated to contest defendants' express representations."

Based on the court's holding in Hudson, if any inducement concerning petitioner's girlfriend did occur, it did not render his trial fundamentally unfair. Here also, the court is faced with petitioner's own representations made during his statement that the statement was being given voluntarily.

Conclusion

Petitioner has failed to raise any ground showing that his trial was violative of any constitutionally protected rights. Accordingly, I respectfully recommend that petitioner's habeas petition be dismissed. Rule 8, Rule Governing §2254 Cases in the U.S. District Courts.

Entered: 2/16/93

Hugh W. Brenneman, Jr.
U.S. Magistrate Judge

ANY OBJECTIONS to this Report and Recommendation must be served and filed with the Clerk of the Court within ten (10) days after service of the report. Failure to serve and file written objections within the specified time waives the right to appeal the District Court's order. Thomas v. Arn, 474 U.S. 140 (1985); United States v. Walters, 638 F.2d 947 (6th Cir. 1981).

Michigan Supreme Court

Lansing, Michigan

Order

Entered: May 31, 1991

Michael F. Cavanagh

Chief Justice

Charles L. Levin
James H. Brickley
Patricia J. Boyle
Dorothy Comstock Riley
Robert P. Griffin
Conrad L. Mallett, Jr.

Associate Justices

89778

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SC: 89778

COA: 109359

TRACY CECIL HAMMOND, JR.,

LC: 87-005164-FC

Defendant-Appellant.

On order of the Court, the delayed application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TRACY CECIL HAMMOND,

Defendant-Appellant.

July 06 1990

No. 109359

Before: Gillis, P.J., and Brennan and Reilly, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree murder, MCL 750.316; MSA 28.548, for the beating death of Cameron Johnson, also known as Ron Johnson. Defendant was sentenced to life imprisonment without parole. Defendant appeals as of right. We affirm.

I.

Defendant first contends that there was insufficient evidence presented at his preliminary examination to bind him over to circuit court on the forst degree murder charge. We disagree.

The evidence presented at a preliminary examination is sufficient to support a bindover if it appears that a crime has been committed and that there is probable cause to believe that the defendant committed it. People v Waters, 118 Mich App 176, 182-183; 324 NW2d 564 (1982), lv den 417 Mich 1053 (1983). The prosecutor must offer evidence as to each element of the offense, but is not required to prove the elements of the crime beyond a

reasonable doubt. People v Martin, 150 Mich App 630, 634; 389 NW2d 713 (1986). The magistrate's decision to bind over an accused will not be reversed by this Court on appeal absent a clear abuse of discretion. People v Talley, 410 Mich 378; 385; 301 NW2d 809 (1981). We first note that our review of this issue is appropriate since defendant moved to quash the information in circuit court. Cf., People v Rashid, 154 Mich App 762, 764; 398 NW2d 762 (1986).

First-degree murder is murder which is perpetrated by means of poison, lying in wait, or other willful, deliberate and premeditated killing. MCL 750.316; MSA 28.548. To premeditate is to think about beforehand; to deliberate is to measure and evaluate the major facets of a choice or problem. People v Vail, 393 Mich 460, 468; 227 NW2d 535 ((1975), quoting People v Morrin, 31 Mich App 301; 187 NW2d 434 (1971). Premeditation and deliberation need not be established by direct evidence but may be inferred from all the facts and circumstances surrounding the killing including, but not limited to: (1) motive; (2) a weapon acquired and positioned in preparation for the killing; and (3) organized conduct prior or subsequent to the killing suggesting the existence of a plan. People v Youngblood, 165 Mich App 381, 387; 418 NW2d 472 (1988).

The evidence introduced at the preliminary examination showed that defendant and Mark Hammond planned to steal narcotics from Johnson, thereby providing defendant with a motive. Prior to the killing, defendant told a female acquaintance that he was going to kill someone. On the night that Johnson was killed, defendant and Mark Hammond were armed with a pipe they referreed to as "Fred" and picked up Johnson from a party that he attended. Defendant and Mark Hammond then drove Johnson to a remote location and attempted to rob him. When Johnson resisted, defendant struck Johnson with the pipe. Mark Hammond was also

involved in the assault. The medical examiner opined that Johnson died of multiple blunt force injuries to the head and that some of the injuries were caused by an instrument similar to a pipe. Defendant later attempted to conceal his involvement in the killing by discarding his jacket, "Fred" and a wooden stick in a ditch. On these facts, we are satisfied that the prosecutor presented sufficient evidence at the preliminary examination to show that a premeditated and deliberate killing occurred and that defendant committed the crime. The maigistrate did not abuse his discretion in binding defendant over for trial.

II.

Defendant also contends that there was insufficient evidence presented at trial to support his conviction that the trial court abused its discretion in denying his motion for new trial on the basis that the jury verdict was against the great weight of the evidence. We disagree.

Having reviewed the evidence in the light most favorable to the prosecution, we conclude that there was sufficient evidence from which a rational jury could have found thateach of the essential elements of the crime were proven beyond a reasonable doubt. People v Hampton, 407 Mich 354, 368; 285 NW2d 284 (1979) cert den 449 US 885 (1980). We similarly conclude that the trial court did not abuse its discretion in denying defendant's motion for new trial as there was ample evidence to support the jury verdict. People v Ross, 145 Mich App 483, 494; 378 NW2d 517 (1985). In addition, defendant's self defense claim is utterly without merit as the proofs indicate that defendant was clearly the aggressor. See People v Bryant, 129 Mich App 574, 582; 342 NW2d 86 (1983).

III.

Defendant next contends that the trial court erred in denying defendant's motion for new trial based solely on newly discovered evidence. We disagree.

A trial court's ruling on amotion for new trial based on newly discovered evidence will not be reversed by this Court on appeal absent a clear abuse of discretion. People v Beckley, 161 Mich App 120, 130; 490 NW2d 759 (1987).

Our review of the record indicates that the testimony of Clara Hammond could have ben obtained by defendant prior to trial with the use of reasonable diligence. The testimony of Mark Hammond's cell-mate was cumulative and would probably not have produced a different result at trial, considering the substantial evidence against defendant. Accordingly, the trial court did not abuse its discretion in denying defeendant's motion for new trial. People v Bradshaw, 165 Nich App 562, 567; 419 NW2d 33 (1988).

IV.

Defendant further contends that the trial court committed error requiring reversal in refusing to allow John Budd to testify on defendant's behalf. We disagree.

A fundamental element of due process is the right of a criminal defendant to present his or her own witnesses at trial to establish a defense. US Const, Am VI; Washington v Texas, 388 US 14, 19; 87 S Ct 1920; 18 L Ed 2d 1019 (1967). However, this right is not absolute and must be weighed against the need for established rules of procedure and evidence designed to ensure both fairness and reliability when ascertaining guilt and innocence. Chambers v Mississippi, 410 US 284, 302; 93 S Ct 1038; 35 L Ed 2d 297 (1973). Blancing these competing interests in determining whether a criminal

defendant can present a witness' testimony rests within the sound discretion of the trial judge. See People v Nixten, 160 Mich App 203, 211; 408 NW2d 77 (1987). In Nixten, supra, this Court adopted a harmless error test to determine whether a trial judge's refusal to allow a defense witness to testify is error requiring reversal.

Two inquiries are pertinent as to whether an error is harmless. First, is the error so offensive to the maintainance of a sound judicial process that the error can never be regarded as harmless? Second, if not so basic an error, vcan this Court determine that the error was harmless beyond a reasonable doubt? People v Robinson, 386 Mich 551, 563; 194 NW2d 709 (1972).

In this case, we find no abuse of discretion on the part of the trial court in refusing to allow John Budd to testify . In a post trial motion to preserve his testimony, Budd testified that he removed Mark Hammond from his will and replaced him with the victim, Cameron Johnson. This testimony was primarily offered to show that Mark Hammond had a motive to kill Johnson. However, evidence of Mark Hammond's intent or motive to kill Johnson is irrelevant where, as here, Mark Hammond was tried before a separate jury. MRE 402.

V.

Defendant next contends that the trial court erred in declining to suppress his confession to the police as it was improperly induced by a promise of leniency. We disagree.

On appeal from a Walker [1] hearing, we are required to examine the entire record and reach an independent determination of the voluntariness of defendant's statements. People v Catey, 135 Mich App 714, 721; 356 NW2d 241 (1984), lv den 422 Mich 940 (1985). We will affirm the trial court's ruling unless it is clearly erroneous, such that we have a definite and firm conviction that a

mistake has been made. People v Watkins, 178 Mich App 439, 447-448; 444 NW2d 201 (1989).

The voluntariness of a statement must be determined from all the facts and circumstances, including the duration of detention, the manifest attitude of the police toward the suspect, the physical and mental state of the suspect, and the pressures which may sap or sustain the suspect's powers of resistence or self-control. Id.; People v Kvan, 160 Mich App 189, 196; 408 NW2d 71 (1987).

We are not left with a definite and firm conviction that the trial court erred in finding defendant's confession voluntary. It is undisputed that defendant had been advised of his Miranda [2] rights before he made the statement to the police. Moreover, the trial court did not believe defendant's testimony that he was induced into making a confession by the interrogating officer's promise to release his girlfriend from custody. The interrogating officer denied making any such promise and testified that defendant's girlfriend was not in custody at the time of the confession. Under these circumstances, we defer to the trial court's ability to judge the credibility of witnesses and reject the defendant's argument that his confession was induced by a promise of leniency. People v Shelson, 150 Mich App 718, 724; 389 NW2d 159 (1986). The trial court did not err in allowing the confession to be admitted at trial.

VI.

We finally reject the defendant's contention that the trial court committed reversible error in refusing to exclude reference to narcotics at trial as it was defendant's theory that he intended to steal narcotics, but not to kill Johnson. Moreover, the trial court instructed the jury as to the proper consideration of that evidence.

Affirmed.

/s/ John H. Gillis

/s/ Thomas J. Brennan

/s/ Maureen Pulte Reilly

[1] People v Walker, (On Rehearing), 374 Mich 331; 132 NW2d 87 (1965).

[2] Miranda v Arizona, 384 US 436; 86 SCt 1602; 16 L Ed 2d 964 (1966).